



FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 79

[CG Docket No. 11-175; FCC 12-83]

Closed Captioning and Video Description of Video Programming

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Federal Communications Commission (Commission) determines that the four factors contained in section 713(e) of the Communications Act of 1934, as amended (Act) will continue to apply when evaluating individual requests for closed captioning exemptions under section 713(d)(3) and our corresponding rules, notwithstanding a change in terminology in the statute, enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010 (CVAA), which replaced the term “undue burden” in that section with the term “economically burdensome.” The Order further amends the Commission’s rules to replace all current references to “undue burden” with the term “economically burdensome.” These rule amendments correspond with the new statutory language in the CVAA requiring petitioners seeking individual closed captioning exemptions under section 713(d)(3) of the Act to show that providing captions on their programming would be economically burdensome.

DATES: Effective **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

FOR FURTHER INFORMATION CONTACT: Karen Peltz Strauss, Deputy Chief, Consumer and Governmental Affairs Bureau; phone: (202) 418-2388; e-mail: Karen.Strauss@fcc.gov.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission’s Report and Order, document FCC 12-83, adopted on July 19, 2012, and released on July 20, 2012. The full

text of document FCC 12-83 is available for inspection and copying during normal business hours in the FCC Reference Information Center, Room CY-A257, 445 12th Street, SW., Washington, DC 20554. The complete text may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc. (BCPI), Portals II, 445 12th Street, SW., Room CY-B402, Washington, DC 20554, (202) 488-5300, facsimile (202) 488-5563, or via e-mail at fcc@bcpweb.com. The complete text is also available on the Commission's website at http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0720/FCC-12-83A1.doc. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an email to fcc504@fcc.gov or call the Consumer and Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (TTY).

PAPERWORK REDUCTION ACT OF 1995 ANALYSIS:

Document FCC 12-83 does not contain new or modified information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Pub. L. 104-13. In addition, therefore, it does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Pub. L. 107-198, see 44 U.S.C. 3506(c)(4).

SYNOPSIS

1. In 1996, Congress added section 713 to the Act (47 U.S.C. 613) establishing requirements for closed captioning on video programming to ensure access by persons with hearing disabilities to television programming and directing the Commission to prescribe rules to carry out this mandate. The Commission's closed captioning rules currently require video programming distributors to caption one-hundred percent of all new, non-exempt English and Spanish language programming.
2. Section 713 of the Act authorizes the Commission to grant individual exemptions from the closed captioning requirements. As originally enacted, section 713 of the Act authorized the Commission to grant individual closed captioning exemptions on a case-by-case basis upon a

showing that the provision of closed captions would “result in an undue burden.” 47 U.S.C. 613(d)(3). Section 713(e) of the Act defined “undue burden” to mean “significant difficulty or expense,” and directed the Commission to consider four factors in making an undue burden determination. Those factors are: (1) the nature and cost of the closed captions for the programming; (2) the impact on the operation of the provider or program owner; (3) the financial resources of the provider or program owner; and (4) the type of operations of the provider or program owner.

3. In October 2010, Congress adopted the CVAA, in which it amended section 713(d)(3) of the Act by replacing the “undue burden” terminology with the term “economically burdensome.” Congress did not change the definition of “undue burden” contained in section 713(e) of the Act or the four factors to be considered in evaluating individual petitions. As a result, on October 20, 2011, the Commission adopted an Order, published at 76 FR 67376, November 1, 2011 and at 76 FR 67377, November 1, 2011, offering provisional guidance on how it would interpret this statutory change and a Notice of Proposed Rulemaking (the NPRM), published at 76 FR 67397, November 1, 2011, proposing to amend § 79.1 of its rules to replace the term “undue burden” with the term “economically burdensome.” In neither the Order nor the NPRM did the Commission make or propose to make any substantive change in the standard for evaluating individual exemption petitions or the factors it would consider when deciding these petitions.

4. In response to the NPRM, the Commission received a single comment filed jointly by Telecommunications for the Deaf and Hard of Hearing, Inc., the National Association of the Deaf, the Deaf and Hard of Hearing, the Consumer Advocacy Network, the Association of Late-Deafened Adults, the Hearing Loss Association of America, and the Cerebral Palsy and Deaf Organization (Consumer Groups). Consumer Groups agreed with the Commission’s proposed interpretation of the economically burdensome standard and concluded that it was consistent with Congress’s expressed and unambiguous intent.

5. In document FCC 12-83, the Commission concludes that, for purposes of evaluating individual exemptions under section 713(d)(3) of the Act, Congress intended the term “economically burdensome” to be synonymous with the term “undue burden” as defined by section 713(e) of the Act and as interpreted and applied in Commission rules and precedent. This conclusion is supported by the CVAA itself, which preserves, unchanged, the language in section 713(e) defining an “undue burden” and enumerating the factors to be considered in an “undue economic burden” analysis, and by the CVAA’s legislative history, which encouraged the Commission in its determination of “economically burdensome” petitions to continue using these factors in assessing individual exemption requests.

6. Accordingly, document FCC 12-83 concludes that in changing the terminology from “undue burden” to “economically burdensome” in section 713(d)(3) of the Act, Congress did not intend any substantive change to the criteria that the Commission consistently has used for individual closed captioning petitions. It notes that this interpretation is consistent with the manner in which the Commission has interpreted the term “economically burdensome” in other recent Commission rules adopted pursuant to the CVAA governing the delivery of closed captioning on video programming delivered using Internet protocol and rules governing video description, and concludes that the Commission and CGB under delegated authority, will continue to evaluate individual exemption petitions filed under section 713(d)(3) of the Act using the four factors set forth in section 713(e) of the Act.

FINAL REGULATORY FLEXIBILITY ACT CERTIFICATION

7. The Regulatory Flexibility Act of 1980, as amended (RFA), (5 U.S.C. 601 – 612, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996)), requires that a regulatory flexibility analysis be prepared for notice-and-comment rule making proceedings, unless the agency certifies that “the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities” (5

U.S.C. 605(b)). The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction” (5 U.S.C. 601(6)). In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act (5 U.S.C. 601(3)). A “small business concern” is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA)(15 U.S.C. 632).

8. In document FCC 12-83, the Commission conforms the terminology used in § 79.1(f) of the Commission’s rules to the requirements of section 202 of the CVAA. Under the rule amendments adopted herein, a petitioner seeking an exemption from the closed captioning requirements will have to demonstrate that compliance with such captioning requirements would be “economically burdensome” as mandated by the CVAA. Prior to this amendment, the Act and our rules required a petitioner to show that complying with the captioning requirements would constitute an “undue burden.” In mandating this change in terminology, the Commission concludes that Congress intended no substantive change to the factors used to evaluate individual petitions for closed captioning exemptions. Because no substantive changes to the Commission’s rules or procedures were contemplated by the NPRM, the Commission concluded in the NPRM that the proposed change in our rules to reflect the terminology adopted by Congress in section 202 of the CVAA would have no economic impact on small business entities or consumers and included in the NPRM an Initial Regulatory Flexibility Certification.

9. No comments were received concerning the Certification, and the Report and Order finds no reason to change the Commission’s conclusions as contained in that Certification. Therefore, the Commission certifies that the rule amendments adopted in document FCC 12-83 will not have a significant economic impact on a substantial number of small entities. The amendments contain no new obligations or prohibitions. Nor do they remove any requirements or have substantive

implications of any sort. They simply change the nomenclature utilized by the Commission's rules to describe the showing that must be made by petitioners to warrant exemptions from the closed captioning requirements, as mandated by Congress in section 202 of the CVAA. In addition, document FCC 12-83, including a final certification, will be sent to the Chief Counsel for Advocacy of the SBA.

CONGRESSIONAL REVIEW ACT

10. The Commission will send a copy of document FCC 12-83, including a copy of this Final Regulatory Flexibility Certification, in a report to Congress pursuant to the Congressional Review Act (5 U.S.C. 801(a)(1)(A)).

ORDERING CLAUSES

11. Pursuant to sections 4(i), 303(r) and 713 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303(r) and 613, document FCC 12-83 IS ADOPTED and the Commission's rules ARE HEREBY AMENDED.

12. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of document FCC 12-83, including the Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

13. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of document FCC 12-83, in a report to Congress and the Government Accountability Office pursuant to the Congressional Review Act.

List of Subjects in 47 CFR Part 79

Cable television, Closed captioning.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch,
Secretary.

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 part 79 as follows:

PART 79 – CLOSED CAPTIONING OF VIDEO PROGRAMMING

1. The authority citation for part 79 continues to read as follows:

Authority: 47 U.S.C. 151, 152(a), 154(i), 303, 309, 310, 330, 544a, 613, 617.

2. Amend § 79.1 by revising paragraph (d)(2), the heading of paragraph (f), and paragraphs (f)(1) through (4), (f)(10), and (f)(11) to read as follows:

§ 79.1 Closed captioning of video programming.

* * * * *

(d) * * *

(2) Video programming or video programming provider for which the captioning requirement has been waived. Any video programming or video programming provider for which the Commission has determined that a requirement for closed captioning is economically burdensome on the basis of a petition for exemption filed in accordance with the procedures specified in paragraph (f) of this section.

(f) Procedures for exemptions based on economically burdensome standard. (1) A video programming provider, video programming producer or video programming owner may petition the Commission for a full or partial exemption from the closed captioning requirements. Exemptions may be granted, in whole or in part, for a channel of video programming, a category or type of video programming, an individual video service, a specific video program or a video programming provider upon a finding that the closed captioning requirements will be economically burdensome.

(2) A petition for an exemption must be supported by sufficient evidence to demonstrate that compliance with the requirements to closed caption video programming would be economically burdensome. The term “economically burdensome” means significant difficulty or expense.

Factors to be considered when determining whether the requirements for closed captioning are economically burdensome include:

- (i) The nature and cost of the closed captions for the programming;
- (ii) The impact on the operation of the provider or program owner;
- (iii) The financial resources of the provider or program owner; and
- (iv) The type of operations of the provider or program owner.

(3) In addition to these factors, the petition shall describe any other factors the petitioner deems relevant to the Commission's final determination and any available alternatives that might constitute a reasonable substitute for the closed captioning requirements including, but not limited to, text or graphic display of the content of the audio portion of the programming. The extent to which the provision of closed captions is economically burdensome shall be evaluated with regard to the individual outlet.

(4) An original and two (2) copies of a petition requesting an exemption based on the economically burdensome standard, and all subsequent pleadings, shall be filed in accordance with § 0.401(a) of this chapter.

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(10) The Commission may deny or approve, in whole or in part, a petition for an economically burdensome exemption from the closed captioning requirements.

(11) During the pendency of an economically burdensome determination, the video programming subject to the request for exemption shall be considered exempt from the closed captioning requirements.

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